Dr Trilochan Kaur d/o Mohan Singh v The Malaysian Dental Council & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R3(1)–25–129 OF 2004
MOHAMAD ARIFF JC
30 APRIL 2009

Legal Profession — Professional discipline — Practice and Etiquette Rules — Application for disqualification of solicitors — Active participation by advocate and solicitor and legal firm in disciplinary enquiry proceedings before Dental Council — Whether improper to act for Dental Council in judicial review proceedings challenging its decision — Advocate and solicitor implicated directly — Whether position akin to a witness — Whether difficult to maintain professional independence — Legal Profession (Practice and Etiquette) Rules 1978 rr 3, 4, & 5

This was an application for judicial review, seeking to challenge the proceedings of the Malaysian Dental Council and its Preliminary Investigation Committee. The participation of Mr Rajasingam, a partner in the firm of Messrs Lewis & Co ('the firm'), as the legal adviser and advocate and solicitor, to the Dental Council was raised by the applicant as one of the issues on which the decision of the Dental Council was being challenged. Mr Rajasingam was the advocate and solicitor advising the committee, and later the Council, on all questions of law in the course of their disciplinary enquiry. Further, the firm, Mr Rajasingam's firm, were the solicitors to the Preliminary Investigation Committee and the Dental Council during the disciplinary inquiry stage. Counsel for the applicant raised a preliminary objection that since the firm had actively participated in the proceedings before the Preliminary Investigation Committee and the Dental Council, it was therefore improper for the firm, to now also act for the Dental Council in this judicial review proceedings.

Held, allowing the preliminary objection:

(1) Given the circumstances, Mr Rajasingam himself could not act as counsel in this judicial review application. Since Mr Rajasingam had been implicated directly, it would be very difficult for him to maintain his professional independence and to act in a manner compatible with the best interests of the administration of justice, as was required under

r 5 of the Legal Profession (Practice and Etiquette) Rules 1978 ('Rules'). Likewise, he would be embarrassed if he accepted the brief, within the meaning of r 3 and r 4 of the Rules (see para 14).

(2) The position of Mr Rajasingam was akin to someone who was a witness or likely to be made a witness or party, in a proceedings. Such a person cannot act as counsel in the very same proceedings for obvious reasons. It will be very difficult to maintain the required professional independence to act in the best interest of the administration of justice. In principle too, any other person from the same firm of solicitors will be unable to maintain the very same required degree of professional independence and avoid embarrassment (see para 15). *Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 5 MLJ 705 followed.

[Bahasa Malaysia summary

Ini merupakan permohonan untuk semakan kehakiman, untuk mencabar prosiding Majlis Pergigian Malaysia dan Jawatankuasa Penyiasatan Permulaan. Penyertaan Encik Rajasingam, rakan kongsi dalam firma Tetuan Lewis & Co ('firma tersebut'), sebagai penasihat undang-undang dan peguambela dan peguamcara, kepada Majlis Pergigian telah dikemukakan oleh pemohon sebagai salah satu isu atas keputusan Majlis Pergigian dicabar. Encik Rajasingam adalah peguambela dan peguamcara yang menasihatkan jawatankuasa, dan selanjutnya Majlis, bagi kesemua persoalan berkaitan undang-undang sepanjang penyiasatan disiplin. Seterusnya, firma tersebut, firma Encik Rajasingam, merupakan peguam-peguam bagi Jawatankuasa Penyiasatan Permulaan dan Majlis Pergigian sepanjang peringkat penyiasatan disiplin. Peguam kepada pemohon telah mengemukakan bantahan awal bahawa firma tersebut secara aktifnya telah menyertai prosiding Jawatankuasa Penyiasatan Permulaan dan Majlis Pergigian, oleh itu tidak wajar bagi firma tersebut, untuk bertindak bagi pihak Majlis Pergigian dalam semakan kehakiman ini.

Diputuskan, membenarkan bantahan awal:

(1) Di dalam keadaan ini, Encik Rajasingam tidak dapat bertindak sebagai peguam dalam permohonan semakan kehakiman ini. Memandangkan Encik Rajasingam telah terbabit secara langsung, ini akan menyukarkan dia untuk memastikan kebebasan profesional dan untuk bertindak dalam sikap yang sesuai dengan kepentingan pentadbiran undang-undang, sepertimana yang diperlukan bawah k 5 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Kesopanan)

1978 ('Kaedah'). Tambahan, dia akan dikecewakan sekiranya dia menerima arahan, seperti yang dimaksudkan dalam k 3 dan k 4 Kaedah berkenaan (lihat perenggan 14.

(2) Jawatan Encik Rajasingam bersamaan dengan seseorang yang menjadi saksi atau mungkin menjadi saksi atau pihak tertentu, di dalam prosiding-prosiding. Seseorang itu tidak dapat bertindak sebagai peguam di dalam prosiding yang sama atas sebab-sebab yang amat nyata. Adalah amat sukar untuk memastikan kebebasan profesional yang diperlukan untuk bertindak dalam kepentingan pentadbiran keadilan. Dalam prinsip juga, sesiapa sahaja daripada firma peguam yang sama tidak akan dapat memastikan tahap yang sama diperlukan bagi kebebasan profesional dan mengelak daripada dikecewakan. (lihat perenggan 15). *Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 5 MLJ 705 diikut.]

Notes

For cases on Practice and Etiquette Rules, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1919–1926.

Cases referred to

Dato Dr Low Teong v Malaysian Dental Council Originating Motion No R2–25–10 of 2003 (refd)

Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak [1997] 5 MLJ 705, HC (folld)

Lembaga Jurutera Malaysia v Leong Pui Khun [2007] MLJU 533; [2008] 6 CLJ 93, FC (folld)

Legislation referred to

Dental Regulations 1976 reg 30(1), (2)(a), (b)
Legal Profession (Practice and Etiquette) Rules 1978 rr 3, 4, 5

PS Ranjan (MS Dhillon with him) (PS Ranjan & Co) for the appellant.
RJ Rajasingam (Legal Advisor, Malaysian Dental Council) for the respondents.

Mohamad Ariff JC:

RULING ON PRELIMINARY OBJECTION

[1] In this application for judicial review, seeking to challenge the proceedings of the Malaysian Dental Council and its Preliminary Investigation Committee, the participation of Mr Rajasingam, a partner in the firm of Messrs Lewis & Co, as the legal adviser, and advocate and solicitor, to the Dental Council has been raised by the applicant as one of the issues on which the decision of the Dental Council is being challenged. Mr Rajasingam was the advocate and solicitor advising the committee, and

later the council, on all questions of law in the course of their disciplinary enquiry under reg 30(2)(a) and (b) of the Dental Regulations 1976. Mr Rajasingam was also the legal adviser assisting the committee and the council under reg 30(1) of the same Regulations. Further, Messrs Lewis & Co, Mr Rajasingam's firm, were the solicitors to the Preliminary Investigation Committee and the Dental Council during the disciplinary inquiry stage.

REGULATION 30 OF THE DENTAL REGULATIONS 1976

[2] Regulation 30 reads as follows:

(1) The Council or the Committee may appoint a legal adviser to assist the Council or Committee during an inquiry touching on a disciplinary matter.

(2) The Council or the Committee may appoint a person who is and has been an advocate and solicitor for a period of not less than five years to advise it on —

(a) all questions of law ensuing in the course of the inquiry; and

(b) the meaning and construction of all documents produced during the inquiry.

THE PRELIMINARY OBJECTION

[3] Counsel for the applicant, Mr PS Ranjan, in his written submission, raised his preliminary objection in the following terms:

> Messrs Lewis & Co should not conduct this case for the first respondent, the Dental Council. They had actively participated in the proceedings before the Preliminary Investigation Committee and the Dental Council. The applicant's counsel had objected before the Dental Council to Messrs Lewis & Company's continued participation in the proceedings.

[4] According to the submission of counsel for the applicant, it is improper for Lewis & Co, to now also act for the Dental Council in the judicial review proceedings in the High Court in this case.

[5] Counsel referred to an unreported decision of Wan Afrah J in *Dato Dr Low Teong v Malaysian Dental Council* (Originating Motion No R2–25–10 of 2003), where Her Ladyship, alluding to the appearance of Mr Rajasingam, who was then also the legal adviser to the Dental Council, as counsel in the High Court proceedings, observed:

As for the appearance of the legal adviser as counsel before me, I am of the view that should he appear as a counsel in any matter where his very own conduct is being impugned although in a different capacity, it would be quite embarrassing for the counsel to appear in court. Support for this view is found in rr 4 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978.

[6] Applicant's counsel now seeks to extend the argument a stage further; not only is Mr Rajasingam not to appear as counsel, his firm, Lewis & Co, should not appear as well as solicitors in this judicial review application. By the same token, the present counsel from Lewis & Co, Ms RJ Rajasingam, should not appear as counsel. It has to be noted that Ms RJ Rajasingam is a niece of Mr Rajasingam.

RULES 4 AND 5 OF THE LEGAL PROFESSION (PRACTICE AND ETIQUETTE) RULES 1978

[7] I reproduce below rr 4 and 5:

4 No advocate and solicitor to accept brief if professional conduct likely to be impugned.

No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.

5 No Advocate and Solicitor to Accept Brief If Difficult to Maintain Professional Independence

(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interests of the administration of justice.

(b)(i) An advocate the solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal or other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.

(ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting.

[8] In my view, in addition to rr 4 and 5, r 3 is also relevant to consider, and it reads:

3 Advocate and solicitor not to accept brief if embarrassed

(a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises —

(i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

THE FIRST RESPONDENT'S COUNSEL'S ARGUMENTS

[9] Ms Rajasingam, in referring to reg 30, argued that this provision does not provide for two separate persons to be appointed; there is no prohibition against one person appearing as legal adviser, as well as advocate and solicitor, for the Dental Council, or its Committee. Since there is no prohibition, and Mr Rajasingam could act in both capacities, reg 30 cannot be used to disqualify her or Lewis & Co from appearing in the judicial review proceedings. Ms Rajasingam further argued that she could not see how her relationship with Mr Rajasingam, her uncle, could have any bearing on this case. The case of *Lembaga Jurutera Malaysia v Leong Pui Khun* [2007] MLJU 533; [2008] 6 CLJ 93, was cited for a number of important propositions. First, a domestic enquiry is not bound by strict rules of procedure as would criminal trials. Any allegation of bias on account of a disciplinary body acting as accuser, prosecutor and judge, is untenable. And the following passage in *Lembaga Jurutera Malaysia* is emphasised by counsel:

> ... the respondent had waived any right to object to any advice given by the appellant's legal adviser. The respondent did not object to the legal adviser's presence or role during the oral hearing. In fact, respondent's counsel was fully aware and even acknowledged that the appellant may take advice from the legal adviser ...
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> Thus, for the above reasons, the learned High Court judge was erroneous in concluding that the appellant's decision against the respondent was tainted or rendered bad in law by virtue of the presence and participation of the appellant's secretary and legal adviser in the proceedings.

[10] Furthermore, according to the respondent's counsel, Mr Rajasingam, as the legal adviser to the council and the committee, is not involved in the decision-making process.

[11] In *Lembaga Jurutera Malaysia* case, the Federal Court commented on the presence of the secretary, and stated:

Further, the secretary only attended the meetings ... as the secretary, and ex officio member of the appellant. He did not participate in the decision-making of the matter against the respondent. In any event, anything that the secretary might have said to the appellant would not have been material and would not have caused the respondent any prejudice because the respondent had made the two incriminating admissions of facts. Be that as it may, the allegation of bias should be that of the decision maker and not a person who was not a party or a witness to the proceedings. Since the secretary was not a party or a witness to the proceedings decided by the appellant, the appellant is therefore not guilty of any bias.

THE EFFECT OF *LEMBAGA JURUTERA MALAYSIA*

[12] *Lembaga Jurutera Malaysia* is a Federal Court decision, and I am bound by it. The general pronouncements on bias, the presence of the secretary and legal adviser to a disciplinary body during the course of disciplinary proceedings, and the nature of a disciplinary body as a body which does not need to follow all the trappings of a court of law, and the acceptable position of such body being both accuser, prosecutor and judge, bearing in mind its character, are matters which appear to have been clarified by the Federal Court. So, given this clarification, it would appear that any argument, or objection, based on the presence of the legal adviser and his participation during the course of disciplinary proceedings will now have to be carefully considered on the merits of this judicial review proceedings. But, with respect, that is not the point so far as the preliminary objection is concerned.

[13] Unlike *Lembaga Jurutera Malaysia*, objection is being taken here on the role performed by Mr Rajasingam in the disciplinary proceedings. The applicant has for the moment raised 22 grounds for judicial review; three of the grounds relate to Mr Rajasingam's participation in the disciplinary proceedings. See pp 5 and 6 of 'Outline of Submission for Applicant (Both for Judicial Review and Appeal) With Authorities'. These are, of course, matters going to the substance of this application. For the moment this court is concerned with a narrow question posed by the preliminary objection, namely whether Ms Rajasingam, or anyone else from Lewis & Co, can act as counsel for the Dental Council in the light of the challenge to Mr Rajasingam's participation during the disciplinary proceedings.

[14] The overriding issue for the moment then becomes whether the rules of practice and etiquette will require Lewis & Co not to act in the present circumstances. Given the circumstances, I am of the opinion it is clear Mr Rajasingam himself cannot act as counsel in this judicial review application. Since Mr Rajasingam has been implicated directly, it will be very difficult for him to maintain his professional independence, and to act in a manner compatible with the best interests of the administration of justice, as

A is required under r 5 of the Practice and Etiquette Rules. Likewise, he will be embarrassed if he accepts the brief, within the meaning of r 3 of the Practice and Etiquette Rules. Similarly, under r 4, which requires that an advocate and solicitor shall not accept a brief if he knows or has reason to believe that his own professional conduct is likely to be impugned.

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[15] In principle, the position of Mr Rajasingam is akin to someone who is a witness or likely to be made a witness or party, in a proceedings. Such a person cannot act as counsel in the very same proceedings for obvious reasons. It will be very difficult to maintain the required professional C independence to act in the best interest of the administration of justice. In principle too, I should think any other person from the same firm of solicitors will be unable to maintain the very same required degree of professional independence and avoid embarrassment. The approach adopted by Abdul Malik Ishak J (as he then was) in the *Sykt Pengangkutan Sakti Sdn Bhd v Tan* D *Joo Khing t/a Bengkel Sen Tak* [1997] 5 MLJ 705 is an appropriate one. The issue in this High Court case relates to whether a law firm shall remain on record as solicitors when one of its lawyers is required as witness. Abdul Malik J, after an exhaustive reference to several jurisdictions, had this to say on the matter:

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> To allow (counsel) or his legal assistance to appear in chambers or in open court when the former would be a witness in the case would simply mean flying in the face of the clear words in s 94(3) (n) and (o) of the Legal Profession Act 1976. As advocates and solicitors, they should have due regard to the client's interests and F must conduct themselves with decorum so as not to bring the legal profession into disrepute. The law firm ... would equally be infected and should not remain on record as solicitors for the plaintiff for the simple reason that (counsel) owes that law firm. (This last observation, I must add, is peculiar to the facts of that case, but does not detract from the general principles).

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[16] The principles established by Abdul Malik Ishak J (as he then was) should be followed, and I do so here.

CONCLUSION

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[17] In the circumstances, and bearing in mind the available authorities and the express provisions of the Practice and Etiquette Rules, I will allow the preliminary objection. Another firm of solicitors, who will be independent,

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should be appointed to represent the Dental Council. Such a course will be in the best traditions of the Bar and will serve the proper administration of justice.

Preliminary objection allowed.

Reported by Kanesh Sundram